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November 30, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 27, 2007

Case Number: TSO-0525

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. As discussed below, I find that restoration is warranted in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a Notification Letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to her continued eligibility for an access authorization in connection with her work. In accordance with 10 C.F.R. § 710.21, the Notification Letter included a statement of the derogatory information causing the security concern.

The security concern cited in the Letter involves information that the individual used marijuana once in 2001, at a time when she was the holder of an access authorization. In connection with that incident, the individual associated with another individual who

1/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

also used marijuana. The information came to the attention of the DOE when the individual revealed it on a 2006 Questionnaire for Sensitive Position (QSP), and again during a 2007 Personnel Security Interview (PSI). According to the Notification Letter, this constitutes derogatory information under 10 C.F.R. § 710.8(k) (Criterion K).² The Letter further states that in November 1999, the individual signed a statement acknowledging she was aware that any involvement with illegal drugs could result in the loss of her security clearance. According to the Letter, her use of marijuana after having signed the "acknowledgment" represents a security concern under 10 C.F.R. § 710.8(l) (hereinafter Criterion L).³

The Notification Letter informed the individual that she was entitled to a hearing before a Hearing Officer in order to respond to the information contained therein. The individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual was represented by counsel. The individual testified on her own behalf, and presented the testimony of two friends, a co-worker/friend, a co-worker, her sister, her mother and a clinical psychologist with expertise in forensic psychology, as well as individual psychotherapy. The DOE counsel did not present any witnesses.

2/ Criterion K includes information that the individual has "used. . . a drug. . . listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana. . .) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine or as otherwise authorized by Federal law."

3/ Criterion L includes information that an individual engaged in "any unusual conduct or is subject to any circumstances which tend to show that an individual is not honest, reliable or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation or duress which may cause the individual to act contrary to the best interests of the national security."

II. Hearing Testimony

A. The Individual

The individual testified that in 2001, she had one puff of marijuana at the apartment of a friend who was smoking marijuana. She asked him if she could have a puff of the marijuana cigarette he was smoking. She testified that she had only one puff. She indicated that she never used it before or since. Transcript of Hearing (Tr.) at 17-18. She further testified that she was going through a difficult divorce at the time and she believed that the emotional stress she was under may have caused her to try the marijuana. Tr. at 21, 51. She admitted repeatedly that this constituted very poor judgment on her part and deeply regrets this lapse. Tr. at 53, 55. She stated that the entire episode has been a lesson for her and has had a major impact on her life. Tr. at 26-27. She stated that she will never use marijuana again and has no desire to use illegal drugs. Tr. at 28. She acknowledged that she was aware that she could lose her clearance if she used illegal drugs. Tr. at 52. She stated she will never put her job or her career in jeopardy again. Tr. at 27. In the future, if she feels stressed by events in her life, she plans to turn to a counselor for advice. In this regard, she stated that at the time of her divorce she had received some counseling, but it was only after she had tried the marijuana. Since that time, she has also received some grief counseling in connection with the death of her father, and has received other counseling from this same professional regarding personal issues. This counseling began in May 2006 and has continued on an as-needed basis. She believes that this current counselor will provide her with immediate assistance if needed. Tr. at 58-61; 215-17. She testified that overall she is stronger and is better able to deal with stress that she was in 2001. Tr. at 56.

B. The Psychologist

The psychologist testified that she is a forensic and clinical psychologist and holds a Ph.D. degree. She has a special certification from the American Psychological Association in the diagnosis and treatment of substance use disorders. She met with the individual for four hours in October 2007 and administered tests on that day and on another day. Based on the test results, the psychologist was of the opinion that the individual is unlikely to use or abuse drugs. She believed the drug use was aberrational and that the individual had poor impulse control during a time of stress. The psychologist testified that the individual currently

has the means of dealing with stress because she has people to talk to and psychological help from her own therapist. She testified that there is a low probability of recurrence of the impulsive drug use. She stated in this regard that the individual is stable and staid in her social life. She does not have the profile suggesting she is prone to impulsive behavior. Finally, she stated that the fact that the individual does not appear to have engaged in any inappropriate impulsive behavior in the past six or seven years since the 2001 event is a sufficiently long period from which to judge whether there is a likelihood of recurrence in the future.⁴ Tr. at 85-106.

C. Friends and Co-workers

The individual also brought forth testimony from two friends, a co-worker/friend, and a co-worker. One of the two friends has known the individual for about five years, and the other has known the individual for about eight years. Tr. at 66, 165. They see the individual at least several times a month. Tr. at 67, 172. They believe she is trustworthy, reliable and not impulsive. Tr. at 68, 71, 76, 77, 168, 169, 170. They have never seen the individual use illegal drugs. Tr. at 68, 166, 176. One of these witnesses stated that the individual currently copes with stress by talking to friends, having therapy and keeping a journal. Tr. at 177. She does not believe that the individual will use drugs in the future, stating that the individual is strait-laced and opposed to illegal drug use. Tr. at 176, 178.

The co-worker/friend is a department manager for the individual's contractor-employer. He has known the individual for about eight years. He also knows the individual's mother and sister. Tr. at 143-44. He testified that he and the individual go out to lunch or dinner twice a month and also get together with other friends. Tr. at 145. He has never seen her use drugs or associate with anyone using drugs. He has been to her home and has never noticed any indications of marijuana use. Tr. at 146-52. He believes she is trustworthy, reliable and not impulsive. Tr. at 150, 154, 160. He stated that the individual told him that she had used marijuana a single time and that it was a "stupid" thing to do. Tr. at 157. He indicated that she copes well with on-the-job stress. He testified that when the individual's father passed away, he and the individual discussed this, and he saw no changes in her behavior that would indicate unreliability. Tr. at 158.

^{4/} See also Individual's Exhibit B, Psychologist's Report.

The co-worker is the human resource manager for the individual's contractor-employer. She has known the individual for about six months. Tr. at 110-11. She knows the individual's work performance, and stated that the individual is highly rated. She stated that the individual's manager thinks well of the individual, and she has received regular pay increases. Tr. at 113. She believes the individual is honest, and has never seen the individual exhibit impulsive or unreliable behavior. She believes the individual is reliable. She noted that the individual had negative results on several employer-administered drug screens. She does not believe the individual uses illegal drugs. Tr. at 115-17, 128-131.

D. Individual's Family Members: Mother and Sister

The individual's mother testified that she sees the individual two to three times a week and also visits the individual unexpectedly. She stated she has never seen signs of drug use. Tr. at 190-91. The individual does not associate with illegal drug users and the individual is opposed to illegal drug use. Tr. at 183-84. She believes the one-time drug use was caused by the stress that the individual was experiencing during the time of her divorce, but she has sought counseling and is stronger now. Tr. at 187. She stated that if she thought the individual was under unusual stress, she would advise her to seek help. In this regard, she testified that the individual currently has a counselor. Tr. at 191. She indicated the stress indicators she would look for would be signs of depression, crying, loneliness and desire to stay by herself. Tr. at 191. She believes the individual would tell her if she were experiencing stress, and she would help the individual obtain assistance. Tr. at 192. She does not believe the individual is impulsive or that she will ever use drugs again. She stated that the individual has told her that the 2001 drug use was a mistake. Tr. at 192-3. She testified that the individual is a different person now than she was in 2001. She believes that the individual was in shock from her divorce. She is stronger now, and has learned from that experience. She is not as naive. Tr. at 194.

The individual's sister currently shares an apartment with the individual, and they have lived together for more than three years. Tr. at 197. They socialize at least once a week, go out for dinner and watch movies together. Tr. at 197-98. She believes the individual's marijuana use was an aberration, and that she is reliable and trustworthy. Tr. at 211. She has never seen the individual or any of the individual's friends use illegal drugs. She stated that the individual has never appeared to be under the

influence of illegal drugs. Tr. at 199. She indicated that she has come home unexpectedly and she has never seen marijuana in use nor smelled it. Tr. at 202. She stated that the individual's friends are "strait-laced" and do not use marijuana. Tr. at 207. She further stated that the individual recognizes that her use of marijuana was poor judgment. Tr. at 208. The individual has received counseling, understands herself better, and has learned techniques to deal with stress. If the individual were under stress now, she would tell her to seek counseling from her current counselor. Tr. at 210-11. She believes that the individual would readily do so, as well as seek guidance from those close to her. Tr. at 212.

III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. *Personnel Security Hearing* (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. *Personnel Security Hearing*

(VSO-0005), 24 DOE ¶ 82,753 (1995), *aff'd*, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

A. Criterion K

There is no question that this individual used marijuana in 2001 while she had a security clearance, and that this behavior raises a Criterion K security concern. However, as discussed below, I find the individual has resolved the concern.

As an initial matter, I am convinced that the marijuana use was one-time. The individual testified persuasively on this point.⁵ All of the individual's personal witnesses confirmed that they did not know her ever to use marijuana, or associate with those who use illegal drugs. Her sister, who lives with her, testified convincingly that the individual and her friends do not use marijuana. The individual's mother, who sees her frequently, testified that the individual does not use marijuana. The individual's friends and co-workers confirmed that she does not use marijuana and that she has stated that she is opposed to it. The psychologist believed that the use was limited to the one occasion the individual identified. The psychologist testified that the individual does not exhibit the profile of a drug user.

Moreover, I am convinced that the individual has not used marijuana since that time in 2001. Again, her testimony and that of her witnesses was fully persuasive. More than six years have passed since the marijuana use, and this is sufficient to allow me to

^{5/} In answer to a question regarding why she did not immediately reveal her marijuana use to the DOE, the individual stated that she was not aware she was expected to come forward with this information. The DOE counsel stated that the individual should have known, through training, that she is required to come forward. The DOE counsel indicated that while failure to come forward did not constitute a separate security concern here, she believed that the individual was not being candid in her assertion that she was unaware of this requirement. After considering the individual's testimony here and her overall demeanor, I believe that she is fully credible. I do not find her testimony that she did not realize she was required to report her marijuana use to the DOE in any way diminishes her overall credibility, and reliability. I found the individual's testimony entirely believable. Tr. at 29-48.

conclude that it was an isolated, aberrant episode in her life that is now well behind her.

In addition, I believe that this type of lapse of judgment is not likely to recur. The individual has sought assistance of two professionals, one for divorce counseling and the other for grief counseling. Thus, she has demonstrated a willingness to seek help when she needs it. A letter submitted by her current therapist indicates that the individual is working on stress management. The therapist states that the individual knows how to seek help when she needs it and has a solid support system aside from counseling. Individual's E-mail Submission of November 1, 2007. Thus, the individual has a mechanism in place to help her through difficult times in the future.

Further, the individual recognizes that she used bad judgment and takes full responsibility for her actions at issue here. However, I believe that she has learned a great deal from this experience, and that she will not jeopardize her life-style and career by engaging in any further activity that would put her security clearance into question. I believe that the individual's judgment is now sound. I am also persuaded that, through her therapy, she has gained heightened self awareness and is unlikely to suffer from this type of lapse of judgment in the future. The individual submitted into the record recent drug screen reports showing negative results. Individual's E-mail Submission of October 15, 2007, Exhibits 6a-d. This is an additional factor in her favor.

In view of the foregoing, I find that the individual has fully resolved the Criterion K security concerns in this case.

B. Criterion L

The Notification Letter finds that the following behavior by the individual raises a Criterion L concern: in 1999, she signed a DOE security acknowledgment certifying that she understood that she could lose her access authorization for use or involvement with illegal drugs; yet, she nevertheless used marijuana while holding a security clearance and, in so doing, associated with an individual who used marijuana. According to the Notification Letter, this raises concerns regarding the individual's trustworthiness and reliability.

As stated above, the record in this case indicates that the individual informed the DOE about her use of marijuana when filing her 2006 QSP. Thus, the individual was candid with the DOE when she was asked to indicate any illegal drug use for the previous seven years. Overall, I therefore do not find that the individual has

engaged in unreliable or untrustworthy behavior, apart from the bad judgment involved in using the marijuana. As discussed above, that lapse is now six years behind her and well in the past. The individual has learned how to cope with stressful times, when exercise of good judgment could become an important issue. Although it is true that she might have been subject to pressure or coercion during the period prior to the time she informed the DOE about her illegal drug use, this concern, too, is now resolved. Overall, the individual impressed me as an honest, intelligent and earnest person who can be trusted.

I am persuaded that the individual is now aware of the Criterion L security concerns created by use of illegal drugs, and these concerns are not likely to resurface. For these reasons and those discussed above with respect to Criterion K, I find that the Criterion L concerns have been resolved.

V. CONCLUSION

As the foregoing indicates, I am persuaded that the individual has resolved the Criteria K and L security concerns cited in the Notification Letter. It is therefore my decision that her access authorization should be restored. See *Personnel Security Hearing* (Case No. TSO-0103), 29 DOE ¶ 82,765 (2004); *aff'd* OS (August 4, 2005).

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: November 30, 2007